Per: Zamri Naim bin Ismail v Ex-Parte: Bank Muamalat Malaysia Bhd

HIGH COURT (PULAU PINANG) — IN BANKRUPTCY NO 29–534–03 OF 2013
WONG TECK MENG JC
16 OCTOBER 2014

Civil Procedure — Appeal — Appeal against decision of senior assistant registrar — Dismissal of notice of application — Notice of application filed by judgment debtor to oppose creditor's petition — Failure to comply with terms in bankruptcy notice within seven days after such receipt of the same — Whether bankruptcy notice irregular — Whether creditor's petition filed in accordance with law — Whether filing of creditor's petition premature — Bankruptcy Act 1967

This was an appeal against the decision of the senior assistant registrar in dismissing the notice of application ('encl 8') with costs. Enclosure 8 was filed by the appellant, as judgment debtor to this bankruptcy proceeding, to oppose the creditor's petition ('encl 4'). The bankruptcy notice was filed based on a judgment from the High Court of Alor Setar obtained by the respondent against the appellant ('the said order'). The bankruptcy notice was personally served on the respondent of which an act of bankruptcy was then committed by the appellant due to his failure to comply with the terms in the said bankruptcy notice within seven days after such receipt of the bankruptcy notice of the Bankruptcy Act 1967 ('the BA'). The said notice of intention to oppose the creditor's petition ('encl 6') and an affidavit to oppose the creditor's petition ('encl 7') were filed pursuant to r 117 of the Bankruptcy Rules ('the BR'). The application should be filed via a summons in chambers and not by a notice of application, as this was a mere procedural defect and the fact that neither the appellant nor the respondent have raised this issue, it was to be deemed as though encl 8 was filed vide a summons in chambers pursuant to r 18 of the BR. The issues that arose for adjudication were whether the bankruptcy notice was irregular as it was filed in Penang despite the appellant's address was in Sungai Petani, Kedah; whether the creditor's petition and the said affidavit verifying the truth of the statements filed was in accordance with the law; whether there was a premature filing of the creditor's petition; whether the appellant was allowed to deny the amount of RM4,126,979.67 which was stated in the creditor's petition based on the judgment dated.

Held, dismissing the appeal with costs:

(1) Practice Direction No 3 of 1993 requires the filing of a bankruptcy notice in a state of which the judgment debtor resides, failure to do as per the

above directive, the court is to 'advise' the petitioning creditor to file the bankruptcy notice to the court in the state of which the debtor resides. Nowhere in the Practice Direction connoted for any mandatory compliance of the said advice given by court. It was also pertinent to note that the Practice Direction merely directed the court to advise the petitioning creditor on the place to file the bankruptcy notice thus, giving an impression that compliance of the said direction is administrative in nature and not mandatory. The respondent's act of filing the bankruptcy notice in the state of Penang does not serve as a shield for the appellant to set aside the bankruptcy proceeding. The Practice Direction is only to ensure administrative convenience and efficiency therefore reserving it to the court of which the petitioning creditor had filed the bankruptcy proceeding to exercise its discretion judiciously (see paras 35–36 & 39).

(2) Although the debtor resided in the state of Kedah, it would be more convenient for the latter to come to the Penang Court rather than the Alor Setar Court as the court was situated nearer to Sungai Petani, the appellant's place of residence. On the facts and circumstances surrounding this case, there was clearly no prejudice caused to the appellant although the bankruptcy proceeding was filed in Penang (see para 40).

(3) Rule 97 of the BR clearly provides for only the bankruptcy notice to be served on the appellant and not the request, and in extension the judgment. Nowhere in neither of the said rules nor Form 11 provides for mandatory attachment of the said order. In addition to this, r 109 of the BR clearly provided for the creditor's petition to be served on the appellant and did not require, in extension the judgment (see paras 47 & 51).

(4) Neither the said creditor's petition nor the affidavit verifying the truth of the statement in the creditor's petition were irregular on the ground that both the documents were attested by the same person, as neither the rr 106 nor 99 of the said Rules required different person to attest and sign the said documents for it to be valid (see para 53).

(5) When an action by corporation was brought in its own name and that the petition was duly signed by its manager or attorney, there was no question that the officer had every authority to present a petition on behalf of the respondent as the petition falls squarely under the second limb of r 215 of the BR. The respondent had succinctly followed the requirement of sub-s 133(a) of the BA and the second limb of r 215 of the BR, which was by taking action in its own name and not in the name of its Mr Ong and in acting as the officer authorised by the respondent under the Power of Attorney, Mr Ong had signed the verifying affidavit in accordance with the requirement of the second limb of r 215 (see paras 63–64).

(6) The appellant did not give any notice within the stipulated seven days to dispute the said bankruptcy notice pursuant to the Bankruptcy Act 1967 but merely argued that the creditor's petition was prematurely filed without instituting any bankruptcy proceedings against the other defendants named in the judgment. The appellant had committed the act of bankruptcy after seven days after the service of the bankruptcy notice (see paras 81–82).

(7) If the debtor intends to dispute the petition on the grounds of counterclaim, cross demand which equals or exceeds the judgment debt or to dispute the petitioning creditors debt or the act of bankruptcy, he may do so by filing an application under r 117 of the Bankruptcy Rules 1969 that if such judgment sum in the creditor's petition was not in accordance with the judgment sum reflected in neither of the order of which this bankruptcy proceedings was relied upon nor in the bankruptcy notice, this petition could be invalidated. This was not the case here (see paras 88–98).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan pegawai timbalan pendaftar kerana menolak notis permohonan (lampiran 8). Lampiran 8 difailkan oleh perayu, sebagai penghutang kepada prosiding kebankrapan, untuk menentang petisyen pemiutang (lampiran 4). Notis kebankrapan difailkan berdasarkan penghakiman Mahkamah Tinggi Alor Setar yang diperolehi oleh responden terhadap perayu (perintah tersebut). Notis kebankrapan diserahkan secara kediri kepada responden yang mana satu tindakan kebankrapan telah dilakukan oleh perayu kerana kegagalannya untuk mematuhi terma dalam notis kebankrapan tersebut dalam masa tujuh hari selepas penerimaan notis kebankrapan mengikut Akta Kebankrapan 1967 (AK). Notis tujuan tersebut untuk menentang petisyen pemiutang (lampiran 6) dan satu afidavit untuk menentang petisyen pemiutang (lampiran 7) difailkan menurut k 117 Kaedah Kebankrapan (KK). Permohonan itu sepatutnya difailkan melalui saman dalam kamar dan bukannya melalui notis permohonan, memandangkan ini hanyalah kecacatan prosedur dan fakta bahawa bukan perayu atau responden telah menimbulkan isu ini, ia akan dianggap seperti lampiran 8 difailkan melalui saman dalam kamar menurut k 18 KK. Isu-isu yang timbul untuk pengadilan adalah sama ada notis kebankrapan adalah tidak teratur kerana ia difailkan di Pulau Pinang walaupun alamat perayu adalah di Sungai Petani, Kedah; sama ada petisyen pemiutang dan afidavit tersebut mengesahkan kebenaran penyata yang difailkan adalah mengikut undang-undang; sama ada terdapat satu makluman awal petisyen pemiutang; sama ada perayu telah dibenarkan untuk menafikan jumlah RM4,126,979.67 yang telah dinyatakan dalam petisyen pemiutang berdasarkan tarikh penghakiman.

Diputuskan, menolak rayuan dengan kos:

(1) Arahan Amalan No 3 Tahun 1993 mengkehendaki pemfailan notis kebankrapan dalam negeri di mana penghutang penghakiman bermastautin, kegagalan untuk melakukan seperti arahan di atas, mahkamah adalah untuk 'advise' pempetisyen pemiutang untuk memfailkan notis kebankrapan ke mahkamah dalam negeri di mana penghutang bermastautin. Tiada di dalam Arahan Amalan yang menyatakan untuk apa-apa kepatuhan mandatori terhadap nasihat yang diberikan oleh mahkamah. Ia adalah juga penting untuk memberi perhatian bahawa Arahan Amalan hanyalah mengarahkan mahkamah untuk menasihati pempetisyen pemiutang pada tempat untuk memfailkan notis kebankrapan oleh itu, memberikan tanggapan bahawa kepatuhan terhadap arahan tersebut adalah bersifat pentadbiran dan bukanlah mandatori. Tindakan responden memfailkan notis kebankrapan di negeri Pulau Pinang tidak bertindak sebagai perlindungan untuk perayu untuk mengetepikan prosiding kebankrapan. Arahan Amalan hanyalah untuk menentukan kemudahan dan kecekapan pentadbiran oleh itu menyerahkan keputusan kepada mahkamah di mana pempetisyen pemiutang telah memfailkan prosiding kebankrapan untuk menjalankan budi bicaranya dengan bijaksana (lihat perenggan 35–36 & 39).

(2) Walaupun penghutang bermastautin di Negeri Kedah, ia adalah lebih mudah untuk penghutang datang ke Mahkamah Pulau Pinang dari Mahkamah Alor Setar kerana mahkamah terletak lebih dekat dengan Sungai Petani, tempat tinggal perayu. Atas fakta dan keadaan kes ini, ternyata jelas tiada prejudis dilakukan atas perayu walaupun prosiding kebankrapan difailkan di Pulau Pinang (lihat perenggan 40).

(3) Kaedah 97 KK jelas memperuntukkan hanya untuk notis kebankrapan untuk diserahkan kepada perayu dan bukan permohonan, dan pelanjutan penghakiman. Tiada di mana-mana di dalam Kaedah tersebut atau Borang 11 memperuntukkan lampiran mandatori perintah tersebut. Sebagai tambahan kepada itu, k 109 KK jelas memperuntukkan untuk petisyen pemiutang untuk diserahkan kepada perayu dan tidak memerlukan, pelanjutan penghakiman (lihat perenggan 47 & 51).

(4) Tidak petisyen pemiutang ataupun afidavit mengesahkan kebenaran kenyataan dalam petisyen pemiutang adalah tidak teratur atas alasan bahawa kedua-dua dokumen disahkan oleh orang yang sama, kerana tidak kk 106 ataupun 99 Kaedah tersebut memerlukan orang yang berlainan untuk mengesahkan dan menandatangani dokumen tersebut untuk menjadikannya sebagai sah (lihat perenggan 53).

(5) Apabila satu tindakan oleh perbadanan dibawa atas namanya sendiri dan bahawa petisyen telah ditandatangani oleh pengurus atau peguam, tiada persoalan bahawa pegawai mempunyai semua bidang kuasa untuk mengemukakan satu petisyen bagi pihak responden kerana petisyen itu

jatuh di bawah proviso kedua k 215 KK. Responden telah secara ringkas mengikuti kehendak sub-s 133(a) AK dan proviso kedua k 215 KK, iaitu dengan mengambil tindakan atas namanya sendiri dan tidak atas nama Encik Ong dan dalam bertindak sebagai pegawai yang diberi kuasa oleh responden di bawah Surat Kuasa Wakil, Encik Ong telah menandatangani afidavit mengesahkan menurut kehendak proviso kedua k 215 (lihat perenggan 63–64).

(6) Perayu tidak memberikan apa-apa notis dalam masa tujuh hari yang diberikan untuk mempertikaikan notis kebankrapan menurut Akta Kebankrapan 1967 tetapi hanya menghujahkan bahawa petisyen pemiutang adalah difailkan secara pra-matang tanpa memulakan apa-apa prosiding kebankrapan terhadap defendan lain yang dinamakan dalam penghakiman itu. Perayu telah melakukan perbuatan kebankrapan selepas tujuh hari selepas penyampaian notis kebankrapan (lihat perenggan 81–82).

(7) Sekiranya penghutang berniat untuk mempertikaikan petisyen atas sebab tuntutan balas, tuntutan bersilang yang bersamaan atau melebihi hutang penghakiman atau untuk mempertikaikan hutang pemiutang petisyen atau tindakan kebankrapan, dia boleh berbuat demikian dengan memfailkan suatu permohonan di bawah k 117 Kaedah-Kaedah Kebankrapan 1969 bahawa jika jumlah penghakiman itu dalam petisyen pemiutang tidak mengikut jumlah penghakiman dicerminkan tidak dalam perintah yang mana prosiding kebankrapan ini disandarkan ataupun dalam notis kebankrapan, petisyen ini boleh menjadi tidak sah. Ini tidak berlaku di sini (lihat perenggan 88 & 98).]

Notes

For cases on appeal against decision of senior assistant registrar, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 840–851.

Cases referred to

Delta Drive (M) Sdn Bhd v Hong Leong Finance Bhd [2008] 4 MLJ 400, CA (refd)

Development & Commercial Bank Berhad v Datuk Ong Kian Seng [1995] 2 MLJ 724; [1995] 3 CLJ 307, FC (refd)

Haroun Al-Rashid bin Mohd Yusof, ex p Daya Leasing Sdn Bhd, Re [1996] 5 MLJ 317, HC (refd)

Ho Fok v Ann Bee (M) Sdn Bhd [2002] 5 MLJ 331, HC (refd)

Hong Kong & Sanghai Banking Corp v Yip Kim Khoon [1991] 3 MLJ 172; [1991] 4 CLJ Rep 297, HC (refd)

Kang Chong Yeow, ex p Mivan Far East Sdn Bhd, Re [2001] 3 MLJ 98; [2001] 8 CLJ 226, HC (refd)

Kapten Ho Fooi v Standard Chartered Bank Malaysia Berhad [2004] MLJU 733, HC (refd)

Chong Sew Jin ex p; Borneo Housing Mortgage Finance Bhd, Re [1991] 3 CLJ 2470, HC (refd)
Gerald Giam Seng Teck, ex p Prime Credit Leasing Sdn Bhd, Re [1999] MLJU 582; [2000] 3 CLJ 460, HC (refd)
Go Ah Lek; ex p United Malayan Banking Corp Bhd, Re [1998] 7 MLJ 160, HC (refd)
Khoo Chee Tong, ex p Unik (M) Sdn Bhd, Re [1996] 5 MLJ 39, HC (refd)
Mat Shah bin Safuan ex p United Asian Bank Bhd, Re [1991] 2 MLJ 48, HC (refd)
Mohd Sharif bin Sapie, ex p Malayan Banking Bhd, Re [1992] 2 MLJ 102, HC (refd)
Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Administratrix Of The Estate Of Mohamad Shariff Bin Haji Hussain), Re [2000] 6 MLJ 155, HC (refd)
Woo Yoke San @ Woo Yoke Sam; ex p OCBC Bank (M) Bhd, Re [2006] 5 MLJ 638; [2006] 2 CLJ 589, HC (refd)
Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 (refd)
Subramaniam a/l Paidathally v G Ragumaren & Co [2010] MLJU 2045, HC (refd)
Teoh Thean Peng, Ex Parte D & C Leasing Sdn Bhd, Re [1993] 2 MLJ 1; [1993] 2 CLJ 665, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3(1)(i), 3(2), 3(2)(ii), 5, 5(1)(c), 23(1), 92, 131, 133(a)
Bankruptcy Rules 1969, rr 18, 97, 99, 101(1), 101(2), 106, 109, 117, 215, Form 11
Companies (Winding Up) Rules 1972 r 26
Courts of Judicature Act 1964 s 23(1)

Kumarathiraviam a/l Kasinathan (Lee Hean Cheng & Co) for the appellant.
Chuah Jo-Shua (Zaid Ibrahim & Co) for the respondent.

Wong Teck Meng JC:

INTRODUCTION

[1] This is an appeal against the decision of the senior assistant registrar in dismissing the notice of application ('encl 8') with costs.

[2] Enclosure 8 was filed by the appellant, as judgment debtor to this bankruptcy proceeding, to oppose the creditor's petition ('encl 4'). Together with the filing of the said encl 8, the appellant had also filed a notice of intention to oppose the creditor's petition ('encl 6') and an affidavit to oppose

A the creditor's petition ('encl 7') which was respectively filed on 5 September 2013.

[3] The bankruptcy notice was filed on 11 March 2013 ('encl 2') based on a judgment from the High Court of Alor Setar obtained by the respondent against the appellant in Civil Suit No 22A-186 of 2003 on 27 March 2007 ('the said order'). I now reproduce the relevant terms of the judgment given by the court as follows:

MAKA ADALAH PADA HARI INI DIHAKIMI bahawa:

a) Plaintif dibenarkan memasukkan Penghakiman Muktamad terhadap Defendan Kedua, Ketiga dan Keempat yang dinamakan menurut Kaedah-Kaedah Mahkamah Tinggi 1980 untuk jumlah sebanyak RM 4,172,999.70 setakat 12.5.2004; dan

c) kos ...

[4] The bankruptcy notice was personally served on the respondent on 23 April 2013 of which an act of bankruptcy was then committed by the appellant due to his failure to comply with the terms in the said bankruptcy notice within seven days after such receipt as per s 3(1)(i) of the Bankruptcy Act 1967 (Act 360). Hence, the creditor's petition was therefore presented on 6 August 2013.

[5] It is to be noted that the said notice of intention to oppose the creditor's petition ('encl 6') and an affidavit to oppose the creditor's petition ('encl 7') were filed pursuant to r 117 of the Bankruptcy Rules 1969 PU (A) 199/69.

[6] It is to be noted that this application should be filed via a summons-in-chambers and not by a notice of application, as this is a mere procedural defect and the fact that neither the appellant nor the respondent have raised this issue, it is to be deemed as though encl 8 was filed vide a summons-in-chambers pursuant to r 18 of the Bankruptcy Rules 1969 PU (A) 199/69.

SUBMISSION

[7] Before arriving to any findings, I must first consider the grounds relied upon by the appellant in justifying his appeal. There are five grounds of which the appellant had sought before this court to consider, these are:

(a) the court of which have jurisdiction to hear this bankruptcy proceedings;

(b) defective creditor's petition;

(c) the order dated 27 March 2007 was illegally obtained;

(d) premature filing of the creditor's petition; and

(e) the debt in the creditor's petition is not in accordance with the debt in the judgment.

[8] It is to be noted that I would only discuss on the points raised in the respondent's submissions which are relevant for my consideration, in other words, only to the issues raised by the appellant for this appeal.

(a) Place to hear this bankruptcy proceeding

[9] One of the grounds furnished by the respondent was that this bankruptcy proceeding is irregular as the order relied upon by the respondent in issuing this bankruptcy notice was an order obtained from a court other than the High Court of Penang.

[10] It was submitted that this clearly violates the Arahan Amalan No 3 Tahun 1993, Mahkamah Tinggi Malaya, sub-s 23(1) of the Courts of Judicature Act 1964 (Act 91) and sub-r 101(1) and sub-r 101(2) of the Bankruptcy Rules 1969 PU(A) 199/69.

[11] He then refers to the case of *Hong Kong & Sanghai Banking Corp v Yip Kim Khoon* [1991] 3 MLJ 172 at p 172 ; [1991] 4 CLJ Rep 297 of which was held at p 5 of the said judgment as follows:

> ...The provisions of r 101(1) and (2) are very clear and unambiguous. The words 'shall be filed' means what it says that is it is mandatory and must be filed in the particular state in which the debtor does his business for a greater part of one year preceding the petition. The creditor cannot, to my mind, chose or elect to file in the state more convenient to him. In this case there is clear evidence, which had not been rebutted by the creditor in his affidavit in reply, that the debtor, although he normally resided in Selangor, carried on his business in Johor Bahru since November 1988, well over one year immediately preceding the date of the petition. It is my finding that the proper place for the petition to be filed is the High Court in Johor Bahru and the creditor has wrongly filed this petition in Kuala Lumpur and as such on this point alone I hold that the petition is bad in law and ought to be set aside ...

[12] It was further contended by the appellant that the respondent had acted mala fide with the intention to prejudice the appellant due to his deliberate act of filing this bankruptcy proceeding at the Penang High Court despite having full knowledge of the appellant's place of residence which is in Sungai Petani, Kedah.

[13] The respondent on the other hand, submitted that all High Court of Malaya have concurrent and coordinate jurisdiction with each other. To support his proposition, the respondent relied upon the case of *Sova Sdn Bhd v*

Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 which is as follows:

> ... *a branch of the High Court located in any state has concurrent jurisdiction to entertain any civil proceedings*; ...
>
> ... For the above reasons I hold that this court *certainly has jurisdiction to entertain* the present civil proceedings *notwithstanding that the four criteria* stipulated in section 23(1) of the 1964 Act are not applicable ...
>
> ... I am also of the view that it is for the defendants to apply to this court for a transfer of the civil suit ... (Emphasis added.)

(b) Defective filing of the creditor's petition

[14] The appellant submits that the creditor's petition ('encl 4') which was filed together with the affidavit verifying the truth of the statement in the creditor's petition ('encl 5') is defective as the said order was not attached to neither of these documents.

[15] In denying the above argument, the respondent argued that nowhere in the Bankruptcy Act 1967 or rules provides for the mandatory attachment of the said order to either the creditor's petition or the affidavit verifying the truth of the statement in the creditor's petition.

[16] The respondent further submits that this is a non-issue as the said order was attached together with the request for the filing of the bankruptcy notice which is pursuant to s 92 of the Bankruptcy Act 1967 (Act 360).

[17] Next, the appellant submitted to this court that the affidavit verifying the truth of the statement in the creditor's petition ('encl 5') did not attach any creditor's petition in accordance with Form 11 of the Bankruptcy Rules 1969 PU (A) 199/69.

[18] A reference was made to the case of *Re Haroun Al-Rashid bin Mohd Yusof, Ex P Daya Leasing Sdn Bhd* [1996] 5 MLJ 317 to justify his argument, which is as follows:

> ... Section 6(1) of the Bankruptcy Act and r 106 of the Bankruptcy Rules 1969 ('the Bankruptcy Rules') require the verification by affidavit with sufficient particularity of the creditor's petition and the aforesaid petition must be annexed or tied to or bound to or affixed to or stapled to the verifying affidavit so as to avoid any dispute as to what exactly is being verified ...
>
> ... I am of the opinion that a creditor's petition should fulfill the statutory requirements of the Bankruptcy Act and unless this is done the court should be very chary of curing deficiencies in it by exercising its discretionary power of waiving them. In the instant case I am of the view that s 6(1) of the Bankruptcy Act and r 106 of the Bankruptcy Rules are mandatory provisions and therefore any failure to

abide by them cannot be taken as mere irregularities that can be cured. In this case substantial injustice has been caused to the appellant by the shortcomings of the petition whereby a verification by affidavit with sufficient particularity is found wanting ...

[19] In addition to the above defect, the appellant submitted that another defects found was that both the creditor's petition and the affidavit verifying the truth of the statement were signed and affirmed by one Ong Chong Hui. The appellant argued that the respondent has committed grave injustice as is illogical for the same person to verify the truthfulness of a previous document he had just made.

[20] In rejecting the above argument by the appellant, the respondent argued that the said documents can be signed and affirmed by the same person as he was an individual authorised by the respondent to do so.

[21] To support the above proposition, the respondent then produced before this court exh OCH-1 of the said affidavit verifying the truth of the statement in the creditor's petition consisting of a copy of a power of attorney empowering the said Ong Chong Hui with the power to sign or affirm any documents in the name of the respondent.

[22] Besides alleging that the respondent's creditor's petition is irregular, the appellant had suggested to this court that this creditor's petition is a false, sham and fraudulently filed as the affidavit verifying the truth of the statement in the creditor's petition was affirmed one day before the date of the creditor's petition. The appellant argues that such irregularity is incurable under s 131 the Bankruptcy Act 1967 (Act 360) as the said affidavit verifies the truthfulness of non-existent petition.

[23] At this juncture, the respondent responded by furnishing the reason for such difference was due to the late filing of both of the said documents by one day from the date of the affirmation of the said affidavit. Such defect, according to the respondent is a mere technical error and is curable under the law as the creditor's petition was already in existence when Ong Chong Hui affirms the said affidavit.

[24] He then refers to the case of *Re Teoh Thean Peng, Ex Parte D & C Leasing Sdn Bhd* [1993] 2 MLJ 1; [1993] 2 CLJ 665 on the following:

... I am firmly of the view that the affirmation of this affidavit shortly before the petition is filed but after it has been duly attested is permissible, and well within the scope of the Act and the Rules. It is also practical, convenient and saves expense because all the required documents can be filed simultaneously and thereafter taken at one go by the Registry ...

(c) The order dated 27 March 2007 was illegally obtained

[25] For the above ground, it was alleged by the appellant that the said order was irregular as the learned deputy registrar, in allowing the amount of RM4,172,999.70, had acted beyond his jurisdiction when such calculation was made from 12 May 2004 as opposed to the date of which was claimed by the respondent (as of 28 August 2003) in his writ of summons.

[26] At this juncture, the respondent argues that the appellant is barred from raising this issue as the said order was never appealed upon.

(d) Premature filing of the creditor's petition

[27] Next, the appellant argued that there was premature filing of the creditor's petition ('encl 6') by the respondent against the appellant as guarantor when he had failed to take any action against the principal debtor, the second and third defendants named in the said order prior to the filing of this application.

[28] He argues that, the respondent should have taken execution action against the first, second and third defendant who are the principal debtor and directors of the principal debtor before resorting to him, who he believed to be a social guarantor.

[29] The respondent in his submission submitted that the second and third defendants in the said order were already made a bankrupt on 16 January 2008. Therefore this bankruptcy proceeding serves as the last resort for the respondent to recover the judgment debt owed.

(e) The debt in the creditor's petition is not in accordance with the debt in the judgment

[30] The appellant next denied the amount owed as alleged in the creditor's petition and put the onus on the respondent to prove that the amount of RM4,126,979.67 was actually owed by him. This according to the appellant, was due to the fact that the principal debtor had actually paid the amount of RM79,613.68 to the respondent therefore making the amount to be lesser than the said RM4,126,979.67 ie RM4,093,386.02.

[31] It was also submitted that it would be wrong for the respondent to incur any additional cost against him especially on the legal fees which was wholly denied by the appellant.

[32] Responding to the above issue raised, the respondent explained that the

amount of RM4,126,979.67 was an amount accrued after the deduction of the said RM79,613.88 paid to the respondent. In furtherance to this, the respondent further submits that the appellant is barred from raising this issue due to the appellant's failure to challenge the said amount within the specified time as per sub-s 3(2) of the Bankruptcy Act 1967 (Act 360).

ISSUES ON APPEAL

[33] There were five issues raised by the appellant in his application to set aside the respondent's petition of which are as follow:

(a) whether the bankruptcy notice is irregular as it was filed in Penang despite the appellant's address is in Sungai Petani, Kedah?

(b) whether the creditor's petition and the said affidavit verifying the truth of the statements filed is in accordance with the law?

(c) whether this bankruptcy court could go behind the judgment dated 27 March 2007?

(d) whether there was a premature filing of the creditor's petition?

(e) whether the appellant is allowed to deny the amount of RM4,126,979.67 which was stated in the creditor's petition based on the judgment dated 27 March 2007?

DECISION

(a) Whether the bankruptcy notice is irregular as it was filed in Penang despite the appellant's address is in Sungai Petani, Kedah?

[34] On this issue, I hereby refer to the Practice Direction No 3 of 1993 which is as follows:

> (ii) Pendaftaran kes-kes kebankrapan Semua kes kebankrapan hendaklah difailkan di mahkamah di dalam negeh di mana Si Berhutang Penghakiman bermastautin.
>
> Bagi kes-kes kebankrapan yang difailkan di mahkamah selain daripada mahkamah yang dinyatakan di atas, mahkamah yang berkenaan *hendaklah menasihatkan pihak yang memohon (Petitioner) untuk memfailkan kes-kes berkenaan di mahkamah di mana Si Berhutang Penghakiman bermastautin* ...

[35] The above practice direction requires the filing of a bankruptcy notice in a state of which the judgment debtor resides, failure to do as per the above directive, the court is to 'advise' the petitioning creditor to file the bankruptcy notice to the court in the state of which the debtor resides.

[36] Nowhere in the above practice direction connotes for any mandatory compliance of the said advice given by court. It is also pertinent to note that the

said practice direction merely directs court to advise the petitioning creditor on the place to file the bankruptcy notice thus, giving an impression that compliance of the said direction is administrative in nature and not mandatory.

[37] I am in total agreement with the views of the learned judge in the case of *Re Kang Chong Yeow, Ex P Mivan Far East Sdn Bhd* [2001] 3 MLJ 98; [2001] 8 CLJ 226 as per the following:

> ... It is appropriate to consider at this point the terms of the Practice Direction No 3 of 1993:
>
> The said *Practice Direction was issued for administrative convenience and efficiency*.
>
> The requirement that the notice be filed in the state where the debtor is domiciled is to assist to ensure that notices could be served effectively and quickly. The Practice Direction was not issued to shield debtors from bankruptcy notices, such that bankruptcy notices not filed in accordance therewith must be set aside. The second paragraph directs courts to advise petitioners in the state where the debtor is domiciled. *It does not authorise the dismissal of or declare invalid any bankruptcy notice filed in a place other than where the debtor is resident. In such event, the court has the discretion, to be exercised judicially, whether to require the petitioner to file the bankruptcy notice in the state where the debtor is domiciled*.
>
> It is noted that it was not disputed that the process server was unable to serve the bankruptcy notice upon the debtor at either address but had to serve the same upon the debtor in Penang. The Petaling Jaya address is not much different in terms of distance from the Kuala Lumpur Court and the Shah Alam Court. No greater hardship is caused upon the debtor merely because the bankruptcy notice is filed in Kuala Lumpur rather than in Shah Alam. Thus even if it is true the debtor now has his residence in the said Petaling Jaya address which he originally denied, there is no inconvenience caused upon the debtor to appear in Kuala Lumpur. In the circumstances I would reject the objection... (Emphasis added.)

[38] This was being affirmed in the case of *Subramaniam a/l Paidathally v G Ragumaren & Co* [2010] MLJU 2045 as per the following:

> ... I share the approach adopted by the courts in *In Re Kang Chong Yeow, Ex Parte Mivan Far East Sdn Bhd* [2001] 3 MLJ 98; [2001] 8 CLJ 226 and *Re Samuel Pakianathan a/l Jabamanikam, Ex Parte Perwira Habib Bank (M) Bhd* [1996] 1 LNS 126 that this administrative practice exists purely for administrative convenience and efficiency. A breach of this administrative direction could not, on the facts of the present bankruptcy proceedings, invalidate these proceedings. On the present facts, the Judgment Debtor had not complained about the main claim not being filed in Johor Bahru. He in fact engaged numerous counsels from Kuala Lumpur, and he himself filed his claim in relation to the taxation of the bills in Kuala Lumpur. *On these facts, there was clearly no prejudice caused to him although the bankruptcy proceedings were filed in Kuala Lumpur* ... (Emphasis added.)

[39] With the above proposition, I am of the view that the respondent's act of filing the bankruptcy notice in the state of Penang does not serve as a shield for the appellant to set aside this bankruptcy proceeding. This direction is administrative in nature and as per the case of *Subramaniam a/l Paidathally*, it was held that the practice direction is only to ensure administrative convenience and efficiency therefore reserving it to the court of which the petitioning creditor has filed the bankruptcy proceeding to exercise its discretion judiciously.

[40] By looking at the situation surrounding this application, I am of the view that though the debtor resides in the state of Kedah, it would be more convenient for the latter to come to the Penang Court rather than the Alor Setar Court as this court is situated nearer to Sungai Petani, the appellant's place of residence. On the facts and circumstances surrounding this case, I am of the view that there was clearly no prejudice caused to the appellant although the bankruptcy proceeding was filed in Penang.

[41] It is important to note that the case of *Hong Kong & Sanghai Banking Corp v Yip Kim Khoon* [1991] 3 MLJ 172; [1991] 4 CLJ Rep 297 which was referred to by learned counsel of the appellant is of no application here as it was decided before the coming into effect of the Practice Direction No 3 of 1993.

[42] I am also in agreement with the submission of the learned solicitor for the respondent that by virtue of sub-s 23(1) of Courts of Judicature Act 1964 (revised–1972) (Act 91), sub-r 101(1) and (2) of the Bankruptcy Rules 1969 PU (A) 199/69 which according to the case of *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 impresses upon us that all High Court of Malaya have respective concurrent and coordinate jurisdiction.

[43] Hence, it is noteworthy to refer to the judgment in the *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 as per the following:

> ... I am also of the view *that it is for the defendants to apply* to this court for a transfer of the civil suit ... (Emphasis added.)

[44] At this juncture, I am in agreement with the findings of the learned judge and were of the opinion that if the debtor finds it as a burden for him to travel to and fro from Sungai Petani to Penang, it is for him to apply to this court for a transfer of this bankruptcy proceeding and not vice versa.

(b) Whether the creditor's petition and the said affidavit verifying the truth of the statements filed is in accordance with the law?

[45] One of the points raised by the appellant as to justify his argument of irregular filing of the creditor's petition was that the bankruptcy notice of

which was premised upon in filing the said creditor's petition was null and void ab initio as the request for the issuance of the bankruptcy notice was served without attaching the 27 March 2007's order.

[46] It is important to note that based on the court's record, the said 27 March 2007's order was in fact attached to the said request.

[47] It is however this court's contention that r 97 of the Bankruptcy Rules 1969 clearly provides for only the bankruptcy notice to be served on the appellant and not the request, and in extension the judgment. For ease of reference, r 97 of the said rules is as follows:

> ... A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition ...

[48] This is therefore a non-issue.

[49] Next, on the argument that the order dated 27 March 2007 was not attached to neither the creditor's petition nor the affidavit verifying the truth of the statement in the creditor's petition, I hereby refer to r 99 of the Bankruptcy Rules 1969 PU (A) 199/69 as per the following:

> ... Rule 99 Form of petition.
>
> (1) Every petition shall be dated, signed and witnessed (Forms 3, 9).
>
> (2) The creditor or debtor shall lodge with the Registrar sufficient number of copies of the petition to be sealed and issued for service.
>
> (3) The creditor or debtor shall transmit a sealed copy of the petition to the official Assignee by post or otherwise ...

[50] I also refer to r 106 of the Bankruptcy Rules 1969 PU (A) 199/69 as per the following:

> ... Rule 106 Verification.
>
> (1) A creditor's petition shall be verified by affidavit.
>
> (2) A petitioning creditor who cannot himself verify all the statements contained in his petition shall file an affidavit made by some person who can depose to them (Form 11) ...

[51] It is to be noted that nowhere in neither of the said rules nor Form 11 provides for mandatory attachment of the said order. In addition to this, r 109 of the Bankruptcy Rules 1969 clearly provides for the creditor's petition to be served on the appellant and does not require, in extension the judgment. For ease of reference, r 109 of the said rules is as follows:

> ... Rule 109 Personal service.

A creditor's petition shall be personally served and service shall be effected by an officer of the Court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor ...

[52] Therefore, based on the above proposition, I am of the opinion that this issue should not be entertained in determining the regularity of the respondent's creditor's petition.

[53] I am inclined to reject on the issue raise by the appellant that neither the said creditor's petition nor the affidavit verifying the truth of the statement in the creditor's petition were irregular on the ground that both of the documents were attested by the same person, as neither the r 106 nor r 99 of the said rules require different person to attest and sign the said documents for it to be valid.

[54] It was also observed that the respondent had exhibited a power of attorney at exh OCH-1 of his affidavit verifying the truth of the statement in the creditor's petition to show that Ong Chong Hui has the authority to verify the affidavit.

[55] Perusing through the submissions of both parties, I find that this issue falls squarely on the interpretation of sub-s 133(a) of the Bankruptcy Act 1967 (Act 360) and r 215 of the Bankruptcy Rules 1969 PU (A) 199/69.

[56] I hereby refer to the case of *Ho Fok v Ann Bee (M) Sdn Bhd* [2002] 5 MLJ 331 as follows:

... the petition was signed by a director of the JC. lt is therefore fell squarely within the limb of r 215 that allowed a petition to be 'presented by the corporation, and signed by the officer on its behalf. It is not therefore require the person to state that he had been authorised under seal ...

[57] Subsection 133(a) of the Bankruptcy Act 1967 (Act 360) allows an action to be taken by a corporation through any of the officer in the corporation authorised under the seal of corporation.

[58] Rule 215 of the Bankruptcy Rules 1969 PU (A) 199/69 clearly spells out the conditions of which the said affidavit verifying the truth of the statements in the creditor's petition is to be attested. For ease of reference, the conditions under r 215 could be divided as per the following:

(a) where a corporation presents a petition or takes any other action under this act, this officer of the corporation may act in his own name, stating that he is such officer duly authorised under seal; and

(b) but a petition may be presented by the corporation and signed by the officer on its behalf.

[59] Therefore, I am of the opinion that a corporation may take action in bankrupting its debtor by either taking action in its own name or by the name of its officer so long as there is an authorised seal given to the incumbent officer.

[60] Bearing the two limbs in mind, it was further stated under r 215 of the Bankruptcy Rules 1969 199/69 as follows:

> ... Any person chosen by the corporation to act for it as agent is an 'officer' within s 133 and if DULY AUTHORISED UNDER SEAL can act for the corporation ...

[61] I hereby find that sub-s 133(a) of the Bankruptcy Act 1967 (act 360) should be read conjunctively with the first limb of r 215 of the Bankruptcy Rules 1967; that mandatory requirement of the seal of corporation is only applicable in cases where actions were to be taken in the name of the respondent's officer or in cases of any other person acting as an agent of the respondent.

[62] In the case of *Re Mat Shah bin Safuan ex p United Asian Bank Bhd* [1991] 2 MLJ 48 where the court finds that the requirement of an authorised seal of corporation is dispensed with in cases where a person signing the said affidavit where the judgment creditor took action in its own name.

[63] Therefore, based on the above case, I find that when an action by corporation was brought in its own name and that the petition was duly signed by its manager or attorney, there is no question that the officer has every authority to present a petition on behalf of the respondent as the petition falls squarely under the second limb of r 215 of the Bankruptcy Rules 1969 PU (A) 199/69.

[64] Therefore, looking at the present situation at hand, the court finds that the respondent had succinctly followed the requirement of sub-s 133(a) of the Bankruptcy Act 1967 (Act 360) and the second limb of r 215 of the Bankruptcy Rules 1969 PU (A) 199/69, which was by taking action in its own name and not in the name of its Mr Ong Chong Hui and in acting as the officer authorised by the respondent under the power of attorney, Mr Ong Chong Hui had signed the verifying affidavit in accordance with the requirement of the second limb of the r 215.

[65] Therefore the claim by the respondent in this instance is valid and does not contravene any statutory provisions on bankruptcy.

[66] On the issue of invalid filing of the said creditor's petition and the affidavit verifying the truth of the statement in the creditor's petition on the ground that the said creditor's petition was dated one day after the said affidavit verifying the truth of the statement in the creditor's petition, I hereby refer to the case of *Re Mohd Sharif bin Sapie, ex p Malayan Banking Bhd* [1992] 2 MLJ 102 at p 105 as per the following:

> ... In *Sobri bin Arshad* 2, that passage from *Chin Yoon Timber Co* 1 was cited with approval, it being referred to as having been well put. Western Benefit Building Society 3, an extension of which the above proposition was purported to be, was also referred to in Sobri bin Arshad:
>
> 'It is trite law that an affidavit must be made in some cause or matter pending in court. An affidavit cannot support an 'unborn petition' as a petition comes to life only when presented. In *Western Benefit Building Society* (1864) 33 Beau 368; 55 ER 409, Sir John Romly MR decided that an affidavit sworn before the presentation of the petition 'amounts to nothing'. That case was followed in the local case of *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173 ... I therefore agree with the submissions of the counsel for the judgment debtor that the flaw in the proceedings hereinbefore mentioned vitiates the creditor's petition and cannot be cured by the discretionary powers of the court ...
>
> *With respect I cannot accept the proposition that because the affidavit verifying the petition was sworn to before the petition was presented the effect was that the petition was vitiated. In winding-up petitions, r 26 itself makes it clear that the petition has to be presented before the verifying affidavit is sworn* ... (Emphasis added.)

[67] This principle was later affirmed in the Court of Appeal case of *Delta Drive (M) Sdn Bhd v Hong Leong Finance Bhd* [2008] 4 MLJ 400 as per the following:

> ... After making reference to several authorities, including *Re Mohd Sharif bin Sapie, ex p Malayan Banking Bhd* [1992] 2 MLJ 102 and *Sari Atlantic Sdn Bhd v Aik Kim Enterprise* [1988] 1 MLJ 201, the learned judicial commissioner ruled that there is nothing wrong with the petition and that the matter can be rectified by the re-swearing of the affidavit verifying the petition. He said (at p 35 of the appeal record):
>
> It is therefore the view of this court that the premature swearing or affirming of the affidavit verifying petition on 26 November 1998 was a mere irregularity and curable by this court as no injustice has been caused to the company.
>
> [9] The learned judicial commissioner then ordered that the respondent be allowed to reaffirm or re-swear the affidavit verifying the petition within ten days with costs to be paid by the respondent. We noted that the appellant did not appeal against this order of the court. Be that as it may, we are of the view that the learned judicial commissioner was correct in making that order. *Re Mohd Sharif bin Sapieand Sari Atlantic Sdn Bhd* referred to above would lend support to that order. In *Re Mohd Sharif bin Sapie*, VC George J said (at p 105):
>
> With respect I cannot accept the proposition that because the affidavit verifying the petition was sworn to before the petition was presented the effect was that the

petition was vitiated. In winding up petitions, r 26 itself makes it clear that the petition has to be presented before the verifying affidavit is sworn ...

[68] Based on the above proposition, I find that the difference of one day is a mere irregularity and is curable under s 131 of the Bankruptcy Act 1967 (act 360). Unlike the Companies (Winding Up) Rules 1972, neither the Bankruptcy Act nor its rules provides for a mandatory requirement as per r 26 of the said rule as per the following:

> ... Every petition for the winding-up of a company by the court shall be verified by an affidavit referring thereto. The affidavit in Form 7 shall be made by the petitioner or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary or other principal officer thereof, and *shall be sworn after and filed within four days* after the petition is presented, and the affidavit shall be prima facie evidence of the statements in the petition ... (Emphasis added.)

[69] What the bankruptcy rules merely states on the verification of the said petition vide r 106 of the Bankruptcy Rules 1967 as per the following:

> ... (1) A creditor's petition shall be verified by affidavit.
>
> (2) A petitioning creditor who cannot himself verify all the statements contained in his petition shall file an affidavit made by some person who can depose to them (Form 11) ...

[70] Based on the above provisions and principles discussed, I find that that the defect with regards to the date of the affidavit verifying the truth of the creditor's petition and the creditor's petition is a mere technical error and is curable under s 131 of the Bankruptcy Act 1967 (act 360).

[71] The second issue raised by the appellant is hereby dismissed.

(c) Whether this bankruptcy court could go behind the judgment dated 27 March 2007?

[72] The next issue which was raised by the appellant was whether I can go behind the 27 March 2007's judgment and interfere with the findings of the learned deputy registrar.

[73] As held in the case of *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Shariff bin Haji Hussain)* [2000] 6 MLJ 155, a judgment stands valid until it is set aside.

[74] Furthermore, it is an established principle of law (see *Re Chong Sew Jin, ex p; Borneo Housing Mortgage Finance Bhd* [1991] 3 CLJ 2470; *Re Khoo Chee*

Tong, ex p Unik (M) Sdn Bhd [1996] 5 MLJ 39; *Re Go Ah Lek; ex p United Malayan Banking Corp Bhd* [1998] 7 MLJ 160) that the court cannot go behind the judgment unless there is evidence of fraud, collusion or miscarriage of justice.

[75] Therefore, I will not further look into the issue of the validity of the judgment.

(iv) Whether there was a premature filing of the creditor's petition?

[76] On the fourth issue raised by the appellant on premature filing of the creditor's petition, the prerequisites before filing of a creditor's petition as per s 5 of the Bankruptcy Act 1967 (Act 360) as follows:

> ... (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:
>
> (a) the debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition the aggregate amount of debts owing to the several petitioning creditors,amounts to thirty thousand ringgit;
>
> (b) the debt is a liquidated sum payable either immediately or at some certain future time;
>
> (c) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition; and
>
> (d) the debtor is domiciled in Malaysia or in any state or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in Malaysia or has carried on business in Malaysia personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in Malaysia by means of a partner or partners or an agent or manager.
>
> (2) If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.
>
> (3) A petitioning creditor shall not be entitled to commence any bankruptcy action against a social guarantor unless he proves to the satisfaction of the court that he has exhausted all avenues to recover debts owed to him by the debtor ...

[77] In this case, the relevant provision for this court's determination is with regards to s 5(1)(c) 'the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition'.

[78] Having said that, s 5(1)(c) of the said act entails for the creditor's petition to be filed after the act of bankruptcy has been committed.

[79] Section 3(1)(i) of the Bankruptcy Act 1967 (act 360) on the act of bankruptcy occurred as per the following:

> ... (1) A debtor commits an act of bankruptcy in each of the following cases:
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amountof the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained: Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order ...

[80] Section 3(2)(ii) of the Bankruptcy Act 1967 (Act 360) provides that if a judgment debtor intends to dispute the validity or the sum specified in a bankruptcy notice, he or she must do so within seven days after the service of the bankruptcy notice. If the judgment debtor fails to do so, it has been held that judgment debtor has abandoned his/her right to dispute (see *Re Gerald Giam Seng Teck, ex p Prime Credit Leasing Sdn Bhd* [1999] MLJU 582; [2000] 3 CLJ 460, *Re Woo Yoke San @ Woo Yoke Sam; ex p OCBC Bank (M) Bhd* [2006] 5 MLJ 638; [2006] 2 CLJ 589).

[81] In this case, the appellant did not give any such notice within the stipulated seven days (23 April 2013), to dispute the said bankruptcy notice pursuant to s 3(2)(ii) of the Bankruptcy Act 1967 (act 360) but merely argues that the creditor's petition was prematurely filed without instituting any bankruptcy proceedings against the other defendants named in the 27 March 2007's judgment.

[82] It was observed that the situation raised by the appellant does not fall within the purview of s 3(2)(ii). I therefore find that the appellant had committed the act of bankruptcy after seven days after the service of the bankruptcy notice on 23 April 2013.

[83] Hence, there was no premature filing of the creditor's petition on 6

August 2013 pursuant to s 5(1)(c) of the Bankruptcy Act 1967 (Act 360).

(d) Whether the appellant is allowed to deny the amount of RM4,126,979.67 which was stated in the creditor's petition based on the judgment dated 27 March 2007?

[84] Like the bankruptcy notice, there are two modes to successfully set aside a creditor's petition, these are:

(a) By filing an application under r 18 of the Bankruptcy Rules 1969 PU (A) 199/69; or

(b) By filing a notice to oppose under r 117 PU (A) 199/69.

[85] The instances for the correct filing of the above modes were illustrated in the case of *Kapten Ho Fooi v Standard Chartered Bank Malaysia Berhad* [2004] MLJU 733 as follows:

> ...They must as decided in *Datuk Lim Kheng Khim v Malayan Banking Bhd* (1993) 2 MLJ 298, follow the requirement under r 18 of the Bankruptcy Rules *where unless the Judgment Debtor has a counter claim, set off and cross demand which equals or exceeds the judgment debt*, challenges to any creditor's petition or Bankruptcy Notice must be made by filing a notice of motion (summons in chambers now after the amendment on r 18 of the Bankruptcy Rules), supported by an affidavit ...

[86] Rule 117 of the Bankruptcy Rules 1969 PU (A) 199/69 as follows:

> ... Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard [Form 16] ...

[87] Form 16 is as per the following:

> ... In the matter of a bankruptcy petition presented against me of on the day of ..., 19 ... by ... of ... (or and ... of ..., etc).
>
> I, the above , do hereby give you notice that I intend to oppose the making of a receiving order as prayed and that I intend to dispute the *petitioning creditor's debt (or the act of bankruptcy, or as the case may be)* ... (Emphasis added.)

[88] Based on the above, I am of the opinion that, if the debtor intends to dispute the petition on the grounds of counter claim, cross demand which equals or exceeds the judgment debt or to dispute the petitioning creditors debt or the act of bankruptcy, he may do so by filing an application under r 117 of the Bankruptcy Rules 1969 PU (A) 199/69.

[89] If the debtor intends to dispute the creditor's petition by relying on other grounds besides the above mentioned grounds, he may do so by filing an application under r 18 of the Bankruptcy Rules 1969.

[90] As in this case, the appellant is disputing on the validity of the sum specified in the creditor's petition, the relevant provision for me to refer to is under r 117 of the Bankruptcy Rules 1969 PU (A) 199/69.

[91] I hereby refer to the Federal Court case of *Development & Commercial Bank Berhad v Datuk Ong Kian Seng* [1995] 2 MLJ 724; [1995] 3 CLJ 307 as per the following:

> ... Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute. The contents of the notice can be found in Form 16 of the rules wherein it must be stated that he intends to oppose the making of the receiving order as prayed and that he intends either to dispute the petitioning creditor's debt or the act of bankruptcy or as the case may be. Rule 18 of the Rules further provides that except where the rules or the act provide, every application shall, unless the court otherwise directs, be made by motion supported by an affidavit. In *Datuk Lim Kheng Kim*, the Supreme Court held that failure to follow r 18, which requires an application to be made by motion supported by affidavit, renders an affidavit in opposition ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that the debtor has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. This court has no reason to disagree with the decision and will follow it. Accordingly, in our view, the respondent's affidavit in opposition cannot be substituted as a notice to show cause against the creditor's petition to challenge the validity of the bankruptcy notice ...

[92] Based on the above mentioned case, it is mandatory for an application under O 18 to be filed together with a notice to oppose the petition under r 117.

[93] This matter was affirmed in the case of *Kapten Ho Fooi v Standard Chartered Bank Malaysia Berhad* [2004] MLJU 733, as follows:

> ... I am of the view the Judgment Debtor has erred in not complying with the requirement of the abovementioned case law and rules under the Bankruptcy Rules and the subsequent late filing of the affidavit was an attempt to over shadow the Judgment Debtor's earlier procedural flaw which is to be rendered as incurable and fatal. In the Federal Court in the case of *Development & Commercial Bank Bhd v Datuk Ong Kian seng @ Ong Kin Cheang* [1995] 2 MLJ 724, it is decided that, 'Rule 117 provides that where a debtor intends to show cause against a petition he shall file a notice in Form 16 of the Rules Rule 18 provides that. every application shall, unless the Court directs, be made by a motion supported by affidavit'. These are

mandatory provisions and therefore failure to abide by them cannot be taken as a mere irregularity that can be cured ...

[94] Therefore, as the appellant have filed this application vide the summons in chambers, he is thereby allowed to show cause against the creditor's petition vide Form 16 by disputing the petition.

[95] It is noteworthy that though Form 16 does give allowance for the judgment debtor to dispute on the judgment sum in the creditor's petition, it must be read conjunctively with the requirement of s 3(2)(ii) of the Bankruptcy Act 1969 (act 360) as per the case of *Development & Commercial Bank Berhad v Datuk Ong Kian Seng*:

> ... There is yet another ground that we ought to decide on. The judgment of the learned Judge was that not only the sum specified in the bankruptcy notice had exceeded the amount actually due, it also was not in accordance with the terms of the consent judgment, reliance having been placed on the case of *Datuk Mohd Sari*, supra. In the event, the learned judge held, following *Datuk Mohd Sari*, supra, that the amount specified in the bankruptcy notice was not in accordance with the terms of the consent judgment set out above. Consequently, the bankruptcy notice was invalid and non-compliance with it did not constitute an act of bankruptcy.
>
> With respect, we are unable to agree with him. The case of *Datuk Mohd Sari*, while distinguishable from the facts of the instant appeal, ought to be regarded as an exception to s 3(2) proviso (ii) of the Act, because what was decided, based on its own special facts, was that 'the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent judgment as required by 3(1)(1) of the Bankruptcy Act 1967 but was in accordance with the terms of an agreement subsequently entered into by the parties, and therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act 1967.' (ibid, p 348). To apply the ratio in *Datuk Mohd Sari* in the way the learned Judge did, to every case where nothing else except when the sum specified in the bankruptcy notice is larger than the sum in accordance with a judgment on which the bankruptcy notice is based, would be undoubtedly to render nugatory s 3(2) proviso (ii) of the act. Moreover, what is patently clear to us is that on the facts, the respondent cannot be allowed to dispute the validity of the bankruptcy notice on the ground on which he now relies because the notice of dispute by way of his affidavit affirmed on 18 February 1992 has not complied with proviso (ii) to s 3(2) of the act, it having been served on the appellant about seven months after the service of the bankruptcy notice on him (the respondent). The bankruptcy notice cannot therefore be challenged as to the interest specified therein ...

[96] In the present case before me, the amount of which was challenged by the appellant in the creditor's petition is as per the sum in the bankruptcy notice. It is noteworthy that such judgment sum was not challenged under s 3(2)(ii) of the Bankruptcy Act 1967 (Act 360). Therefore, based on the case of *Dato' Ong Kian Siang*, in order for the appellant to succeed under this issue, he

must therefore challenge such validity under s 3(2)(ii) of the Bankruptcy Act 1967 (Act 360) by filing an application to set aside the bankruptcy notice vide r 95 of the bankruptcy rule 1969 PU (A) 199/69 within the stipulate time of seven days

[97] Section 3(2)(ii) entails that an application under r 95 of the Bankruptcy Rules 1969 must be filed within seven days after the service of the said bankruptcy notice on the appellant.

[98] I am of the opinion that if such judgment sum in the creditor's petition was not in accordance with the judgment sum reflected in neither of the order of which this bankruptcy proceedings is relied upon nor in the bankruptcy notice, this petition can be invalidated. This is not the case here.

[99] Based on the above proposition, I find that this issue ought to be dismissed.

CONCLUSION

[100] Hence, applying the above stated established principle of law, I hereby dismiss the appeal with no order as to cost.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor